(27,005)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 321.

WELLS BROTHERS COMPANY OF NEW YORK, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 6, 1919.

1 Court of Claims.

No. 33812.

WELLS BROTHERS COMPANY OF NEW YORK

v.

THE UNITED STATES.

I. *History of Proceedings.*

On July 7, 1917 the claimant filed its original petition.

On November 14, 1917 Charles F. Kincheloe, Esq., withdrew his appearance as attorney of record.

On May 6, 1918 A. R. Serven, Esq. filed his appearance and power of attorney to represent the claimant.

On September 16, 1918, by leave of court, the claimant filed an amended petition, which is as follows:

II. *Amended Petition and Exhibit "A."*

Filed September 16, 1918.

To the Honorable the Chief Justice and Judges of the Court of Claims:

Your petitioner, Wells Brothers Company of New York, respectfully represents:

I.

That your petitioner is a body corporate, duly organized and existing under and by virtue of the laws of the State of New York, and engaged in the general building and construction business, with its principal office in the city, county and State of New York.

2 II.

That under date of September 30, 1909, a written contract was entered into by and between the United States, represented by C. D. Norton, Acting Secretary of the Treasury, and your petitioner whereby your petitioner covenanted and agreed, for a consideration in the sum of eight hundred and seventeen thousand dollars ($817,000), to furnish all the labor and materials and perform all the work required for the construction, excepting mechanical equipment and interior finish, of the United States postoffice and court-house at New Orleans, Louisiana, a copy of which contract, marked "Exhibit A," is hereto annexed, and made a part hereof.

III.

That the work to be performed under said contract was to be commenced by your petitioner promptly upon receipt of notice by it of the approval of its bond, and that said work was to be carried on in such order and at such times and seasons, and with such force, as should from time to time be directed or prescribed by the Supervising Architect of the Treasury Department or his representative; that all materials used and all work performed under the contract were to be satisfactory to the architects of the building, subject to the approval of the Supervising Architect; and that the contract work was to be completed in all its parts by April 1, 1911.

IV.

That it was provided by said contract that time should be considered as of essence of the contract on the part of the contractor; and that in the event that the contract work should not be completed within the contract period, the contractor should pay to the United States, as liquidated damages, the sum of $150 per day for each day of delay in the completion of the contract.

3 V.

That it was also provided by said contract as follows:

"It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the architects of the building, or of the Supervising Architect, it may be necessary for the purpose or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States, properly cover over, secure and protect such of the work as may be liable to sustain injury from the weather, or otherwise; and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work, the same to be ascertained by the Supervising Architect; and a similar allowance of extra time will be made for such other delays as the Supervising Architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within ten days of the occurrence of such delays; provided, further, that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States."

VI.

That on or about October 9, 1909, the bond of your petitioner was duly approved, and petitioner notified thereof; and thereupon petitioner commenced and proceeded with the performance of said contract, and, with the approval of the architects of the building and the

Supervising Architect, proceeded with the necessary excavation and foundation work and the erection of the structural-steel work, according to the terms of the contract.

VII.

That on or about the 1st day of October, 1909, the United
4 States, through the Supervising Architect and the architects of the building, ordered and directed your petitioner to withhold and refrain, until further notice, from ordering the limestone exterior face stone specified by the contract for the construction of the street fronts of said building, for the reason, as stated, that a change was contemplated in said exterior face stonework which would require an additional appropriation by Congress. That your petitioner consented to delay ordering said exterior face stone until October 15, 1909, without additional expense to the United States, and in the meantime proceeded with the excavation, foundation and structural-steel work of the building.

VIII.

That your petitioner did delay the purchase of said exterior face stone to October 15, 1909, but that the United States, acting through the Supervising Architect and the architects of the building failed, neglected and refused to furnish your petitioner with the necessary information, as required by the contract, so that petitioner might or could purchase said exterior face stone and proceed with the work of constructing said walls of the building, and further, ordered and directed that your petitioner should not purchase limestone for the said exterior face stone-work as was specified by the contract, but should withhold and refrain from purchasing the material for said exterior of the building until there should be appropriated a further sum to permit of the construction of said face stone-work of marble instead of limestone. That thereupon your petitioner duly protested to the proper representatives of the United States, both in writing and orally against the delay so ordered by the said Supervising Architect in the purchasing of the materials for the face-stone of said building and the damage that would result to your petitioner by such delay. That thereafter, and on or about August 19, 1910, pursuant to an appropriation by Congress for the purpose, it was decided by the United
States, and agreed by and between the United States and your
5 petitioner, that Georgia Marble should be substituted for limestone in the construction of the exterior of the street fronts of said building above the granite base, and for and on account of which substitution and addition to the contract work, your petitioner was to be paid an additional consideration in the sum of $210,500, and the contract period for the completion of the work extended to February 5, 1912, as per formal consent attached to and made a part of Exhibit "A" hereto.

IX.

That in the meantime, and prior to August 19, 1910, your petitioner had proceeded, as best it could, with other work under said contract, and had substantially completed all the excavation, foundation and structural-steel work without reference to the other work provided to be done under the contract. That after said modification and addition of August 19, 1910, to the contract work, your petitioner proceeded expeditiously with the performance of the contract, and on or about February 1, 1912, had substantially completed said building in accordance with the terms of the contract and said modification and addition thereto except the construction of the partitions of the building. That the building was then ready for the construction of said partitions, the materials for their construction had been purchased, and in large part had been delivered at the site of the work and approved and accepted by the architects of the building and the Supervising Architect, and your petitioner was then ready and prepared, and anxious, to proceed with the construction of said partitions and the completion of the contract; but the United States, through the Supervising Architect and the architects of the building, directed and ordered petitioner to cease and refrain from the construction of said partitions until further orders in the premises, and had failed, neglected and refused to furnish petitioner the required and necessary
6 information, plans and details for the construction of said partitions and completion of the work, though repeatedly requested by petitioner so to do. That your petitioner had duly and repeatedly protested to the proper officers and representatives of the United States, both orally and in writing, against the delay in furnishing said information, plans and details for the construction and completion of said partitions and the damages resulting to your petitioner by such delay.

X.

That said action on the part of the United States in suspending and delaying the construction of said partitions and the completion of the work was in no wise due or chargeable to your petitioner, but was due to the fact that there was then pending in Congress proposed legislation for the creation of a parcels post branch of the United States postal service in the event of the enactment of which it was desired by the defendants to so partition said building as to adapt it also to the needs of the parcels post branch of the postal service; and that said enforced delay of your petitioner continued until after the enactment of said parcels post legislation on or about August 24, 1912, and the preparation by the United States of plans for the partitioning of said building, after which your petitioner was permitted to proceed with and complete the contract.

XI.

That in addition to the extra work and materials set forth in paragraph VIII hereof, your petitioner, at the request of the United

States, performed certain extra work and furnished certain extra materials of the agreed value of $6,809.26, against which the United States were entitled to and allowed an agreed credit of $2,206.30 on acount of certain changes and omissions in the work, leaving a balance of $4,602.96 in favor of petitioner on account of such additional work and materials by it performed and furnished.

7

XII.

That your petitioner has been paid by the United States, for and on account of said contract and work, the original contract price of $817,000 and the additional and agreed compensation of $210,500 for the extra material and work set forth in paragraph VIII hereof, together with the said balance of $4,602.96 on account of extra work and materials as set forth in paragraph XI hereof, making the total net payment to petitioner the sum of one million, thirty-two thousand, one hundred and two and 96/100 dollars ($1,032,102.96), on account of said contract and work, the final payment thereof being received under formal and written protest and that said entire sum of money has been paid to and received by your petitioner without prejudice to petitioner's rights, and without your petitioner having waived its right to claim and recover from the United States additional compensation and damage as herein set forth and claimed.

XIII.

That said suspensions and delays in the prosecution and completion of the work were due solely and entirely to the action of the United States and its authorized officers and agents, and were not due or chargeable to, or contributed to by any fault or negligence on the part of your petitioner.

XIV.

That by reason of said suspensions and delays of the work, your petitioner was unable to prosecute the work in proper sequence and in the usual manner, and was thereby compelled to, and did, expend large sums of money over and above the amounts which would otherwise have been required for its performance.

8

XV.

That by reason of the character of the work to be performed by petitioner and the place where said work was to be and was performed, your petitioner was compelled to and did engage and employ skilled workmen and mechanics in and from various parts of the United States, and was compelled to and did expend large sums of money in the transportation of such skilled workmen and mechanics to New Orleans, Louisiana, for the purpose of carrying on the work under said contract as contemplated by the parties thereto; and that by reason of the said suspensions and delays caused by the United States

in the prosecution and completion of said work, your petitioner, without any fault, default or neglect on its part, was greatly hindered and delayed in the performance and completion of the work and contract; the gangs of skilled workmen and mechanics became and were thereby disorganized and rendered inefficient and partially ineffective, and petitioner was compelled to and did expend large additional sums of money in obtaining other and additional skilled workmen and mechanics and in organizing new gangs thereof, and of laborers in connection therewith, in the performance and completion of said contract. And your petitioner, further, was thereby compelled, at great expense to it, to keep large numbers of skilled workmen, mechanics and laborers in its employ upon waiting time.

XVI.

That on account of such suspensions and delays of the work by the United States, certain portions of the work theretofore performed deteriorated and were injured by the elements and otherwise, and in consequence were rejected by the architects of the building and the said Supervising Architect; large quantities of materials which had been purchased by petitioner and passed upon and approved
9 by the United States had to be stored and held by petitioner during such suspensions and delays, at great expense and loss to petitioner by reason of storage charges thereon and deterioration and rejection of much of such materials; and also, petitioner was for a long and increased period of time deprived of the use of the money held by the United States as retained percentages until the completion of the contract.

XVII.

That the United States through its proper officers and agents, unreasonably rejected large quantities of materials that were afterwards accepted for use and used in the work, which rejections hindered and delayed petitioner in the prosecution of the work; and also unreasonable methods, rules and regulations for the performance of the work were established and enforced by the United States to the further hindrance and delay of petitioner, all to the expense and damage of your petitioner in the performance of the contract.

XVIII.

That by reason of the suspensions by the United States of the prosecution of the work as hereinbefore recited, and the consequent delay in the prosecution and completion of the work and contract, the performance of said work and contract necessarily cost your petitioner the sum of one hundred and nineteen thousand, seven hundred and fifty-nine and 18/100 dollars ($119,759.18) over and above what it would have cost petitioner if the performance of the work had not been so interfered with and delayed by the United States, the items of such increased cost being as follows, to-wit:

10 Item 1. General, or overhead, expense during the increased time over which the work extended. $41,000.00
Item 2. Loss of use of retained percentages during increased time for completion of contract..... 10,018.68
Item 3. Loss of use of money invested in materials for partitions while construction of partitions was suspended 300.00
Item 4. Shoring and maintenance of the structural steel work during delay, after its erection..... 4,425.33
Item 5. Expense due to necessary storage of materials on hand for the work..... 1,962.01
Item 6. Rental of engine while work suspended, and waiting for permission to proceed..... 520.00
Item 7. Cost of monthly photographing of the work, as required by the contract..... 359.70
Item 8. Additional pump, and operating pumps, during additional time required for the work..... 581.08
Item 9. Cost of maintaining and repairing waterproofing of walls..... 3,352.35
Item 10. Cost of maintaining and repairing sidewalk.. 384.02
Item 11. Wages paid employees while work shut down awaiting orders or permission to construct partitions. 2,818.95
Item 12. Loss on cement through deterioration on account of delay..... 311.82
Item 13. Maintenance and repair of cellar floor..... 342.36
Item 14. Traveling expenses, telephone and telegraph messages, postage and other incidental expenses..... 1,094.47
Item 15. Depreciation of equipment..... 3,387.33
Item 16. Increased cost of the work due to disorganization of working forces, and loss in their efficiency.... 48,901.08

11 That your petitioner timely presented a claim for this amount to the proper officers and representatives of the United States for allowance, which said claim has been disallowed.

XIX.

That your petitioner is the sole owner of the claim herein sued upon, and no transfer or assignment of said claim or any part thereof or interest therein has ever been made; that petitioner has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the United States; and that petitioner believes the facts stated in this petition to be true.

Wherefore your petitioner avers that there is justly owing to it by the United States, on account of the matters herein set forth, the sum of one hundred and nineteen thousand, seven hundred and fifty-nine and 18/100 dollars ($119,759.18), after deducting all just set-offs and demands on the part of the United States; and for said sum of $119,759.18 your petitioner prays judgment against the United

States, and also for such other and further relief, both at law and in equity, as the nature of the case may require and to this honorable court may seem meet and proper in the premises.

A. R. SERVEN,
Attorney for Claimant.

JOHN L. HOPKINS,
Of Counsel.

12 DISTRICT OF COLUMBIA, *ss:*

A. R. Serven, being duly sworn according to law, deposes and says, that he is duly authorized, by power of attorney filed herewith, to prosecute this suit; that he has read the above and foregoing petition signed by him as attorney for the claimant, and that the matters therein set forth are true to the best of his knowledge and belief.

A. R. SERVEN.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 16th day of September, 1918.

[SEAL.] W. B. JAYNES,
Notary Public.

13 EXHIBIT A.

Contract Between the United States of America and The Wells Brothers Company of New York.

Whereas, by advertisement, duly made and published according to law, proposals were asked for furnishing all of the labor and materials for the work herein provided for; and

Whereas, The proposal of the Wells Brothers Company of New York, furnished in response thereto, was duly accepted, as hereinafter stated, on condition that a formal contract be entered into in accordance with the terms of said acceptance;

Now, therefore, this agreement, made and entered into by and between C. D. Norton, Acting Secretary of the Treasury, for and in behalf of the United States of America, of the first part, and the Wells Brothers Company of New York, a corporation organized under the laws of the State of New York, and having executive offices in New York, N. Y., of the second part;

Witnesseth, That the party of the second part for the consideration hereinafter mentioned, covenants and agrees to and with the party of the first part to furnish all of the labor and materials and do and perform all the work required for the construction, excepting mechanical equipment and interior finish, of the post-office and court-house in New Orleans, La.; in strict and full accordance with the requirements of drawings numbered HR-101 to HR-111, inclusive, HR-201 to HR-210, inclusive, HR-401 to HR-404, inclusive, HR-1001 to HR-1008, inclusive; and HR-901 to HR-913, inclusive, HR-951 to HR-959, inclusive, so far as applicable, and such

other detail drawings and models as may be furnished to the party of the second part by the architects of the building, or by the Supervising Architect of the United States Treasury Department; the advertisement for proposals, dated July 22, 1909; the specification for the work; the proposal dated August 30, 1909, addressed to
14 the said Supervising Architect by the said party of the second part; and letter dated September 27, 1909, addressed to the said party of the second part by C. D. Hilles, Assistant Secretary of the Treasury, accepting said proposal; a true and correct copy of each of which said papers is attached hereto and forms a part of this contract; and which said numbered drawings, bearing the signature of the said Supervising Architect and the signature of the said party of the second part, are on file in the office of the Supervising Architect of the United States Treasury Department, and are hereby made part of this contract.

And the said party of the second part further covenants and agrees that the work herein agreed to be performed shall be commenced promptly upon receipt of notice of the approval of the bond hereto attached, and that the same shall be carried on in such order and at such times and seasons, and with such force as shall from time to time be directed or prescribed by the architects of the building or by the Supervising Architect or his representative, and that the same shall be completed in all parts by April 1, 1911; that all materials used shall be of the very best quality of their respective kinds; that all the work performed shall be executed in the most skillful and workmanlike manner; that both the materials used and the work performed shall be in every respect to the entire and complete satisfaction of the architects of the building, subject to the approval of the Supervising Architect; and that the party of the second part shall not, in carrying out the provisions of this contract, employ any person undergoing sentence of imprisonment at hard labor which has been imposed by a court of the United States, or of any State, Territory, or municipality having criminal jurisdiction.

And the said party of the second part expressly covenants and agrees that the bond hereto attached shall be security, also, for the satisfactory performance and fulfillment of all the guarantees set forth in or required by said specification.

It is expressly covenanted and agreed by and between the
15 parties hereto that time is and shall be considered as of essence of the contract on the part of the party of the second part, and in the event that the said party of the second part shall fail in the due performance of the entire work to be performed under this contract, by and at the time herein mentioned or referred to, the said party of the second part shall pay unto the party of the first part, as and for liquidated damages, and not as a penalty, the sum of one hundred fifty dollars for each and every day the said party of the second part shall be in default, which said last named sum per day, in view of the difficulty of estimating such damages with exactness, is hereby expressly fixed, estimated, computed, determined, and agreed upon as the damages which will be suffered by the party of the first part by reason of such default, and it is understood and

agreed by the parties to this contract that the liquidated damages hereinbefore mentioned are in lieu of the actual damages arising from such breach of this contract; which said sum the said party of the first part shall have the right to deduct from any moneys in its hands otherwise due, or to become due, to the said party of the second part, or to sue for and recover compensation or damages for the nonperformance of this contract at the time or times herein stipulated or provided for.

The party of the second part further covenants and agrees to hold and save the United States, its officers, agents, servants and employees, harmless from and against all and every demand, or demands, of any nature or kind, for, or on account of, the use of any patented invention, article, or appliance, included in the materials hereby agreed to be furnished under this contract.

It is further covenanted and agreed by and between the parties hereto that the said party of the second part will, without expense to the United States, comply with all the municipal building ordinances and regulations, in so far as the same are binding upon the United States, and obtain all required licenses and permits,
16 and be responsible for all damages to person or property which may occur in connection with the prosecution of the work; that all work called for by the drawings and specifications, though every item be not particularly shown on the first or mentioned in the second, shall be executed and performed as though such work were particularly shown and mentioned in each, respectively, unless otherwise specifically provided; that all materials and work furnished shall be to the satisfaction of the architects of the building, subject to the approval of the said Supervising Architect; and that said party of the second part shall be responsible for the proper care and protection of all materials delivered and work performed by said party of the second part until the completion and final acceptance of same.

It is further covenanted and agreed by and between the parties hereto that the said party of the second part will make any omissions from, additions to, or changes in, the work or materials herein provided for whenever required by said party of the first part; the valuation of such work and materials to be determined on the basis of the contract unit of value of material and work referred to; or, in the absence of such unit of value, on prevailing market rates, which market rates, in case of dispute, are to be determined by the said Supervising Architect, whose decision with reference thereto shall be binding upon both parties, and that no claim for damages, on account of such changes or for anticipated profits, shall be made or allowed.

It is further covenanted and agreed that no claim for compensation for any extra materials or work is to be made or allowed, unless the same be specifically agreed upon in writing or directed in writing by the party of the first part; and that no addition to, omission from, or changes in the work or materials herein specifically provided for shall make void or affect the other provisions or covenants of this contract, but the difference in the cost thereby occasioned, as the case

may be, shall be added to or deducted from the amount of the
17 contract; and, in the absence of an express agreement or provision to the contrary, no addition to, or omission from, or changes in the work or materials herein specifically provided for shall be construed to extend the time fixed herein for the final completion of the work.

It is further covenanted and agreed by and between the parties hereto that all materials furnished and work done under this contract shall be subject to the inspection of the architects of the building, the Supervising Architect, the superintendent of the building, and of other inspectors appointed by the said party of the first part, with the right to reject any and all material not in accordance with this contract; and the decision of the architects of the building, when approved by the said Supervising Architect, as to quality and quantity shall be final. And it is further covenanted and agreed by and between the parties hereto, that said party of the second part will, without expense to the United States, within a reasonable time to be specified by the architects of the building, or by the Supervising Architect, remedy or remove any defective or unsatisfactory material or work; and that, in the event of the failure of the party of the second part immediately to proceed and faithfully continue so to do, the party of the first part may have the same done and charge the cost thereof to the account of the said party of the second part.

It is further covenanted and agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

It is further covenanted and agreed that the party of the first part shall have the right to require that any particular portion of the work herein provided for shall be completed within such time as may be hereafter definitely specified by the said party of the first
18 part in written notice to the said party of the second part; and that should the said party of the second part fail to complete such particular portion of the work within the time so specified, or fail to complete the entire work contemplated by this contract within the time or times herein stipulated or provided for, or fail to prosecute said work with such diligence as in the judgment of the party of the first part will insure the completion of the said work within the time hereinbefore provided, the said party of the first part may withhold all payments for work in place until final completion and acceptance of same, and is authorized and empowered, after eight days' due notice thereof in writing, served personally upon or left at the shop, office, or usual place of abode, or with the agent, of the said party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the said party of the first part, remedy the default for which said notice was given, to take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the

second part delivered on the site, and, at the expense of said party of the second part, to complete or have completed the said work, and to supply or have supplied the labor, materials, and tools, of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part shall be further liable for any damage incurred through such default and any and all other breaches of this contract.

It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the architects of the building, or of the Supervising Architect, it may be necessary for the purpose or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States, properly cover over, secure, and protect such of
19 the work as may be liable to sustain injury from the weather, or otherwise; and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work; the same to be ascertained by the Supervising Architect; and a similar allowance of extra time will be made for such other delays as the Supervising Architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within ten days of the occurrence of such delays; provided, further, that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States.

And the said party of the first part, acting for and in behalf of the United States, covenants and agrees to pay, or cause to be paid, unto the said party of the second part, or to the heirs, executors, administrators, or successors, of the said party of the second part, in lawful money of the United States, in consideration of the herein-recited covenants and agreements made by the party of the second part, the sum of eight hundred and seventeen thousand dollars ($817,000); such payment to be made as prescribed on page six of the specification, and all of the retained percentage of said price shall be forfeited by said party of the second part in the event of the nonfulfillment of this contract; it being expressly covenanted and agreed that said forfeiture shall not relieve the party of the second part from liabiity to the party of the first part for any and all damages sustained by reason of any breach of this contract; provided, however, that no payment hereunder shall be due to the said party of the second part until every part of the work to the point of advancement reached—on account of which payment is claimed—shall be found to be satisfactorily supplied and executed in every particular and any and all defects therein remedied to the entire satisfaction of the said party of the first part.

It is an express condition of this contract that no member
20 of, or delegate to, Congress, or other person whose name is not at this time disclosed, shall be admitted to share in this contract, or to any benefit to arise therefrom; and it is further covenanted and agreed that this contract shall not be assigned.

In witness whereof, the parties hereto have hereunto subscribed their names this 30th day of September, A. D. 1909.

C. D. NORTON,
Acting Secretary of the Treasury.

We hereby certify that this contract and bond have been correctly prepared.

JAS. A. WETMORE,
Chief of Law and Records Division.
JAMES C. PLANT,
Superintendent of Computing Division.

WELLS BROTHERS COMPANY OF NEW YORK. [SEAL.]
J. E. WELLS, *Vice-President.*
F. A. WELLS, *Treasurer.*

Witness to the signature of the contractor:
E. MILDRED CIHLAR.
WILLIAM T. SITT.

21 III. *Defendants' Demurrer to Amended Petition.*

Filed November 2, 1918.

Now come the defendants, by their Attorney General, and demur to the amended petition filed herein September 16, 1918, and for cause show:

That said amended petition does not state facts sufficient to constitute a cause of action against these defendants.

Wherefore defendants pray that said amended petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.

JNO. W. TRAINER,
Attorney for Defendants.

IV. *Argument and Submission of Demurrer.*

On December 16, 1918 the defendants' demurrer to the claimant's amended petition was argued by Mr. John W. Trainer, for the defendants, and by Mr. A. R. Serven, for the claimant.

22 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Twentieth day of January, A. D. 1919, judgment was ordered to be entered as follows:

This case was submitted upon the defendants' demurrer to the claimant's amended petition, on consideration whereof the court is of the opinion that the demurrer is well taken upon the authority of the

case of Merchants' Loan and Trust Co., 40 C. Cls., 117. It is therefore adjudged and ordered by the court that the said demurrer to the plaintiff's amended petition be sustained, and that the petition be and the same is hereby dismissed.

BY THE COURT.

VI. *Claimant's Application for and Allowance of an Appeal.*

Comes now the claimant, by its attorney, in the above entitled cause, and prays this Honorable Court that an appeal be granted therein to the Supreme Court of the United States.

WELLS BROTHERS COMPANY OF NEW YORK,
By A. R. SERVEN, *Its Attorney.*

Filed March 5, 1919.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

March 5, 1919.

23 Court of Claims.

No. 33812.

WELLS BROTHERS COMPANY OF NEW YORK

vs.

THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true trascripts of the pleadings in the above-entitled cause; of the argument and submission of the demurrer to the amended petition; of the judgment of the court; of the claimant's application for, and allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Sixth day of March, A. D. 1919.

[Seal Court of Claims.]

SAML. A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 27,005. Court of Claims. Term No. 919. Wells Brothers Company of New York, appellant, vs. The United States. Filed March 15th, 1919. File No. 27,005.

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TABLE OF CASES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 321.

WELLS BROTHERS COMPANY OF NEW YORK,
APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

Statement of Facts.

This case comes before this court upon appeal from a judgment of the Court of Claims sustaining defendant's demurrer to appellant's petition.

September 30, 1909, the appellant entered into a contract with the appellee to construct the United States post-office and courthouse at New Orleans, Louisiana. Extended specifications and plans were attached to the contract and made a part thereof. As only two requirements of the specifications

and plans are important in this case and as such plans and specifications cover 100 or more typewritten pages they were not attached to the petition, but the substance of the specifications bearing upon the question raised were recited in different paragraphs of appellant's petition. The specifications were filed in the lower court. Immediately upon the execution of the contract appellant proceeded to comply with its terms. The contract provided that the exterior face of the building should be constructed of limestone. (Para. VII, Rec., p. 3.) October 1, 1909, the day following the execution of the contract, appellee directed the appellant not to order the limestone for the exterior facing and thus delayed its receipt. Appellant consented to delay in ordering the limestone up to and including October 15, 1909, and objected to any delay thereafter. Appellee did not change its order October 15, 1909, but continued its direction to appellant to refrain from ordering the exterior facing, alleging as a reason therefor that it was proposed to present a bill to Congress providing for a larger appropriation to change the exterior facing of the building from limestone to marble, and did not authorize appellant to secure the material for the exterior facing of the building until August 19, 1910. (Para. VIII, Rec., p. 3.) On or about August 19, 1910, a separate agreement was entered into between appellant and appellee, under which Georgia marble was substituted for limestone, and it was agreed that appellant should be paid an additional sum of $210,500.00 to cover the cost of the substituted material and additional work, but in no wise waiving its claim for damages for delay. (Para. XII, Rec., p. 5.) The work of construction of the building had proceeded with regularity, and a considerable time prior to the time when appellant was allowed to order the stone for the exterior facing, had reached a state of completion requiring work to proceed on the exterior facing of the building in order that labor employed might be used without loss, and the material on hand used and deterioration prevented and storage and other charges avoided. The

delay in ordering the exterior facing stone caused a corresponding delay in its receipt. This delay caused the damages specifically alleged in the petition (Para. XIV, Rec., p. 5). The contract made time of the essence thereof as to the contractor and required the building to be completed on or before April 1, 1911. After the change ordered by the appellee from limestone to Georgia marble the time for the completion of the contract was extended to February 5, 1912.

After August 19, 1910, appellant proceeded regularly with the work and brought the same to substantial completion on or about February 1, 1912, and had secured the material and was prepared to build the interior partitions. On or about February 1, 1912, appellee ordered appellant to suspend the building of the partitions until future orders. This delay was not because of any difficulty faced by the architects in arranging the partitions of the building for occupation as a post-office and courthouse under the then existing conditions surrounding the receipt, transportation, and delivery of the mails, but was due to a refusal of the architect to furnish any plans for the building of such partitions pending the possible passage by Congress of the parcels-post law which the architect believed would, if it were passed, require a different arrangement of partitions in the building than would be required under the then existing conditions. This delay extended from on or about February 1, 1912, to on or about August 24, 1912, when appellant was instructed to proceed with the erection of the partitions in accordance with plans and specifications then submitted to it. Because of the delay thus caused by the appellee appellant suffered the damages specifically set forth in the petition. (Para. IX, Rec., p. 5; Para. X, Rec., p. 4.)

Appellant presented its claim for damages arising out of the two delays above mentioned to the proper officers of the Government, which claim was rejected, and then brought

suit in the Court of Claims. The contract contained the following provisions:

> "It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the architects of the building, or of the supervising architect, it may be necessary for the purpose or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States, properly cover over, secure and protect such of the work as may be liable to sustain injury from the weather, or otherwise; and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work, the same to be ascertained by the supervising architect; and a similar allowance of extra time will be made for such other delays as the supervising architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within ten days of the occurrence of such delays; provided, further, that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States." (Para. V, Rec., p. 2.)

It is the claim of the Government that under this provision of the contract no damage can be recovered by appellant for any delay caused by the appellee. That the provision in the contract providing for an extension of time in case of delay is the only consideration that appellant can receive for delay and as the time was extended no damages can be recovered.

It is the claim of appellant that the above provision of the contract is not to be read literally but is to be construed as covering only such changes and delays as were within the contemplation of the parties at the time of the signing of the contract and delay, pending possible action by Congress, was not within the contemplation of the parties.

The lower court in dismissing appellant's petition based such dismissal upon the authority of Merchants' Loan and Trust Co. *vs.* The United States, 40 Ct. of Cl., 117, in which case a contract containing a clause similar in character to the above was construed as foreclosing the contractor from making any claim for damages arising from delay on the part of the United States. The appellant does not raise the question of the correctness of the judgment in that case upon the facts appearing therein. The facts in that case showed delays which might well be called within the contemplation of the parties. The appellant contends that the facts in this case show delays not within the contemplation of the parties and therefore not governed by the terms of the contract.

ASSIGNMENT OF ERRORS.

1. The court erred in dismissing appellant's petition.

2. The court erred in dismissing appellant's petition upon authority of Merchants' Loan and Trust Company *vs.* United States, 40 C. Cls., 117.

3. The court erred in holding that the provisions of the contract relieving the appellee from liability for suspensions and delays for the purpose or advantage of the work, relieved the appellee from liability for damages, for suspensions and delays not for the purpose or advantage of the work.

4. The court erred in holding that suspensions and delays caused by the appellee for the purpose of awaiting future action by Congress that might change the specified work were within the contemplation of the parties at the time the contract was executed and were covered by its provisions.

ARGUMENT.

(All italics added for emphasis.)

The provision of the contract relative to suspension and delay is to be construed as including only such suspensions and delays as were within the contemplation of the parties at the time of the signing of the contract, and does not relieve the appellee from liability for damages for delays caused by it which were not within the contemplation of the parties.

Under the judgment rendered by the Court of Claims dismissing appellant's petition, from which appeal is taken, there is but one question presented to this Court for consideration. The judgment of the lower court is wholly based upon its construction of the following clause in the contract between appellant and appellee:

> "It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the architects of the building, or of the supervising architect, it may be necessary for the purpose or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States, properly cover over, secure and protect such of the work as may be liable to sustain injury from the weather, or otherwise; and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work, the same to be ascertained by the supervising architect; and a similar allowance of extra time will be made for such other delays as the supervising architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within ten days of the occurrence of such delays; provided, further, that no claim shall

be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States."

The proper construction of this clause of the contract between appellant and appellee and its application to the facts alleged in the petition is the only question presented to this Court for consideration. The appellant contends that the last proviso of the clause above set forth should not be construed separately from the clause in which it stands, but is qualified and limited by the provisions of that clause and that the clause itself can not be construed separately, but is qualified and limited by all the provisions of the contract, and must receive a construction in accordance with the intention of the parties at the time the contract was entered into.

An analysis of the clause in which the proviso occurs shows that the right of suspending and delaying the work was not an unqualified and unrestricted right, but was expressly limited to the right to suspend or delay when such suspension or delay was "necessary for the purpose or advantage of *the work*." Where the suspension is for the "purpose or advantage of *the work*" then the clause provides that equal additional time shall be granted to the contractor within which to complete *"the work."* This part of the clause clearly limits the power of the United States to suspend operations only when such suspension is for the purpose or advantage of *"the work."* It does not authorize the United States to suspend operations for the benefit of any *other work*. The work as used in this clause of the contract refers but to one thing, and that is the work which the contractor agreed to perform under the contract and which is specifically described in the contract and in the plans and specifications accompanying the same. It is hardly necessary to add that this part of the clause does not give the United States power to suspend the work for the benefit of

some other work that was different from the work specified in the contract. The rule that where power is given to do one thing and this is followed by a power to do other things and the other things which are empowered to be done are stated in general terms, that such general terms are qualified by the particular terms preceding the general terms to mean other things of a similar character to those theretofore set forth, is well settled and needs no citation of authorities to support it. It therefore follows that the words "other delays" and "any delay" appearing in that part of the clause following the provision for suspension and allowing for delay will be construed to mean "other delays" or "any delay" of a character similar to that specified in the first part of the clause. It therefore follows that the clause "no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States" means any delay "necessary for the purpose or advantage of *the work*," and that the clause "necessary for the purpose or advantage of *the work*" means necessary for the purpose or advantage of the particular work specified in the contract and in the plans and specifications which were attached thereto.

The contract provided for the construction of a post-office and courthouse building, the exterior facing of which was to be of limestone and the building itself was to be suitable for a post-office and courthouse at New Orleans, in accordance with the conditions existing in 1909 and the natural changes that would occur between September 30, 1909, and April 1, 1911, on which date the building was to be completed. The suspensions and delays complained of were caused for the purpose of awaiting action on the part of Congress which would enable the United States to have the outer facing of the building constructed of marble instead of limestone, and to change the interior plans of the building so that it would be suitable for handling the parcels-post business provided the parcels-post law was passed by Con-

gress. The question presented is, were the suspensions for the purpose or advantage of the work specified in the contract or were they for the purpose and advantage of a different work than that specified? The question presented in another form is, were these changes within the contemplation of the parties at the time the contract was signed? Or, presented in a little different form, is, what changes can be made in the plans and specifications of a contract which will not so change the purpose and object of the contract as to make it a new and different contract?

The question so presented is not a new one and has been before the State courts, the Federal courts and this court in numerous cases involving the construction of clauses in contracts, authorizing changes in plans and material, of which Para. 3, Rec., p. 10, is a typical example. The question seems to have first arisen in the case of

County of Cook *vs.* Harms, 108 Ill., 151:

The contract which was construed in this case provided for the construction of the courthouse in Chicago and contained the following clause:

> "If the contractor shall be ordered to execute any work, or make any additions, changes or alterations in the work, as hereinafter set forth, and as indicated on the plans, drawings and sections herewith submitted, then it shall be understood and agreed upon that such changes, additions or alterations, if so ordered, shall not invalidate or impair the contract, but they shall be paid for as extra work, or deducted from the original amount of the contract, as the case may be,—such extras or deductions, if any, to be subject to the valuation of the architect, whose decision and valuation of them shall be final and binding upon both parties to the contract."

The court in construing this clause held on page 158 as follows:

> "The contract was made pursuant to bids or proposals previously invited by published notices, and those bids were made upon calculations based upon the plans and specifications annexed to the contract. We are not authorized to assume the furnishing of these plans and specifications, and the inviting of these bids or proposals, were intended either to entrap the unwary or as an idle and useless ceremony; but we must, on the contrary, assume they were intended in good faith, for the purpose of intelligently and *bona fide* making a contract for the construction of the foundation of the courthouse. If intended for that purpose, the work to be done would have to conform, in all material respects, to that described in the plans and specifications; and if materially variant therefrom, it would necessarily be a new and different work, because not within the contemplation of the parties when the contract was made. We do not conceive that the prefixing of the word 'any' materially enlarges the meaning of the words 'changes, additions and alterations,' for if there is only 'change, addition or alteration,' the contract must govern; if there is more than this, it does not, and the question is, simply, what constitutes 'changes, additions or alterations' within their meaning as here used. Counsel insist there is no limit to the changes, additions or alterations that may be made. If this be true, then the advertising for bids and the stipulating of prices in the contract were useless. The contract should then have been drawn that the county would pay for the work at a valuation to be fixed by its architect. * * * We think it was only intended to describe and provide against those ordinary and comparatively unimportant departures from the details in the plans and specifications which, during the progress of the work, might become necessary, or at least convenient, to effectually complete the work as it is contemplated by the plans and specifications it should be completed, and which could not, at the date of making the contract, have been certainly anticipated,

and therefore provided against. We can not admit that a party entering into a contract to do a given work at stipulated prices, can, by the use of these words in the written contract, be made to do a different and more expensive work at prices to be named altogether, or in large part, by the architect of the other party."

This case was followed somewhat later by the case of

Salt Lake City *vs.* Smith *et al.*, 104 Fed., 457:

The contract in this case authorized the engineer of the city to make any necessary or desirable alterations in the work and required the contractors to perform any extra work which the engineer should require them to do, and provided that extra work should be paid for at the contract price. The court in construing these provisions of the contract held on page 464 as follows:

"It is conceded that the literal terms of the contract, when divorced from reason, from the object contemplated by the parties, from their situation, and from their intention, are so general and unlimited as to permit this to be done. But it is clear as the sun at noon in a cloudless sky that the minds of these parties never met upon such a proposition and that they never contemplated or intended to make any such contract. When they settled upon the terms of this agreement they were considering a conduit laid in an open trench six or eight feet deep, 'at such depth below the surface as will insure it against the effects of frost,' as the instructions to bidders read, over a comparatively level surface, requiring materials and work of about the quantities estimated by the engineer, and of a character necessary for the construction of such a work. This was the conduit described in the plans and specifications upon which the bid of the contractors and the contract itself were based, and this was the contract which the parties contemplated and upon which their minds met when they made their agreement. This plain

fact limits every stipulation of the agreement, and in its light and in the light of reason every provision of this contract must be interpreted.

"The stipulation that the contractor shall do such extra work in connection with that described in the agreement as the city engineer and the board of public works may direct is as effectually limited by this fact to such extra work of proportionally small amounts as was necessary to the construction of the contemplated conduit as it would have been if this restriction had been written in the agreement in so many words. * * * The stipulation that 'the city shall have the right to make any alterations that may hereafter be determined upon as necessary or desirable,' and that the contractors shall be paid for increased quantities at the contract prices, is subject to a like limitation. That provision, not unusual in agreements with cities and other corporations, is limited in its meaning and effect, by reason, and by the object of the contract, to such modifications of the contemplated work as do not radically change its nature and its cost. * * *

"The dry words and broad stipulations of contracts must be read and interpreted in the light of reason and of the subject contemplated by the parties. The stipulation common to many corporation contracts, that contractors may be required to perform extra work at the price named in the agreement or fixed by an engineer, is limited by the subject-matter of the contract to such proportionally small amounts of extra work as may become necessary to the completion of the undertaking contemplated by the parties when the contract was made; and work which does not fall within this limitation is new and different from that covered by the agreement, and the contractor may recover the reasonable value thereof notwithstanding the contract. The customary provisions in such contracts that the corporation or its engineer may make any necessary or desirable alterations in the work, and that the contractors shall receive the contract price or a price fixed by the engineer for the work or materials required by the alteration is limited in the same way, by the intention of

> the parties when the contract was made, to such modifications of the work described in the contract as do not radically change its nature or its cost. Material quantities of work required by such alteration, that are substantially variant in character and cost from that contemplated by the parties when they made their agreement, constitute new and different work, not governed by the agreement, for which the contractors may recover its reasonable value."

This case was followed somewhat later by the case of

McMaster vs. The State of New York, 108 N. Y., 542:

In this case the contract contained the following clause:

> "The party of the second part reserves the right to make any change they shall deem proper in the plans and specifications of said buildings, and the work shall be performed by the party of the first part in accordance, for the prices and compensation above set forth, unless such change shall increase the expense of doing such work, in which case the party of the first part shall be paid a reasonable compensation therefor, to be certified by the supervising architect and superintendent."

Under this clause the State changed the exterior facing of the walls, which were to be of stone, to brick, and reduced the number of buildings to be constructed from eleven to four. The contractor protested against this change, and the court in construing this clause of the contract held on page 551 as follows:

> "It certainly had no right to omit entirely the construction of all or any of the buildings. The asylum buildings referred to in the contracts were the central or administration building, the five connecting wards on each side and the out-buildings. These were all to be built. The size and height of them were fixed and the material to be put in the walls was determined. The general character of the buildings could not be

changed so that the buildings would not be the same contracted for; if it could be, then a public letting in such case would not be a useful and might be an idle ceremony. Under such a reservation could a building planned for five stories be reduced to two? Could a stone building let to a stone mason be changed to wood or brick? Could the five connecting wards be reduced to two or three or four? We are clear that authority for such extensive changes could not be found in such language. If the State could change to brick walls with sandstone trimmings, then it could change to walls made wholly of brick, and thus there would be no stone to cut and the cutting contract would be entirely nullified. It is difficult, probably impossible, to draw in advance a precise line between what is authorized by such a reservation and what is not. It authorized such changes as frequently occur in the process of constructing buildings, in matters of taste, arrangements and in details; but it does not authorize a change in the general character of the building. If it does, a contract carefully entered into could be mainly if not entirely frustrated."

To the same effect are the cases of—

Dunning *vs.* County of Orange, 139 App. Div. N. Y., 249.

The Nat. Con. Co. *vs.* H. R. W. P. Co., 192 N. Y., 209.

Gillet *vs.* Bank of America, 160 N. Y., 549-555.

The same rules of construction have been applied by this court to clauses of contracts of a character similar to that involved in this case. In the case of

Chesapeake & Ohio Canal Co. *vs.* Hill, 15 Wall., 94; 21 L. Ed., 64-68,

the literal construction of the terms of the contract would have resulted in a gross injustice, and the court held, Mr. Justice Bradley delivering the opinion, that "the contract was made in reference to *the state of things existing at the time it was made,*" and in placing a construction upon the

contract which was not literal but which was in manifest accord with the real intention of the parties, stated further:

> "This would be in accordance with the substance of the agreement. It would carry out the intent of the parties as gathered from the whole instrument and *the state of affairs existing at the time it was made,* and would save the lessee from a ruinous expenditure for alterations rendered necessary by his mistake."

In the later case of

Wood *vs.* City of Fort Wayne, 119 U. S., 312; 30 L. Ed., 416,

the substance of the clause in the contract between the contractor and the city was set forth by the court in the following language, page 418:

> "The said trustees shall have the right to make any alterations in the extent, dimensions, form or plan of the work contemplated by this contract, either before or after the commencement of construction. If such alterations diminish the quantity of work, the price paid shall be proportionately diminished, and no anticipated profits allowed for the work omitted. If they increase the work, such actual increase to be paid for at contract rate for work of its class.
>
> "All loss or damage arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforeseen obstructions, or any difficulties that may be encountered in the prosecution of the same, also for all expenses which may be incurred in consequence of the temporary suspension of any part of said work, shall be incurred by the contractor without extra charge to said city."

Under this clause the city directed a change in the line of the water works specified in the contract. This change in the line of the pipe required a crossing of the river at a point where the river was much deeper than at the point of crossing indicated in the specifications. The city maintained

that the additional expense incurred by the contractor came within the above provisions and the provision of the contract providing as follows:

> "All loss or damage arising out of the nature of the work aforesaid * * * or any difficulties that may be encountered in the prosecution of the same * * * shall be incurred by the contractor without extra charge to the city,"

and that the contractor could not recover for the additional work done by him in crossing the river at the changed point. The court held, page 419:

> "On the view taken by the defendant, the trustees could have made an alteration of plan requiring that the pipes should traverse a great length of the river, in deep water and quicksand, in crossing it diagonally, and the city could have had all the work done at the general price per lineal foot for laying the pipe. The contract is not capable of such a construction. The actual increase of cost is to be paid for.
>
> "The provision that all loss or damage arising 'from any unforeseen obstructions, or any difficulties' that may be encouraged in the prosecution of the work, 'shall be incurred by the contractor without extra charge' to the city, cannot fairly apply to the obstructions and difficulties at the changed place of crossing, resulting from the increased depth of water and the quicksand."

In the case of

> Utah, Nevada & California Stage Coach Co. *vs.* United States, 199 U. S., 414; 50 L. Ed., 251-252-255,

the contract contained the following provision:

> "To perform all new or additional or changed covered regulation wagon, mail messenger, transfer, and mail station service that the Postmaster General may order at the city of New York, N. Y., during the contract term, without additional compensation, whether

caused by change of location of post-office, stations, landing, or the establishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance or extra wagons from time to time for special or advance trips as the Postmaster General may require, as a part of such new or additional service."

The Government maintained that the contractor could be required to perform any additional service that the Postmaster General might require, and under this contention required the contractor to transport the mail from a station not in existence at the time the contract was entered into and which greatly increased the burden of the service. Mr. Justice Day, in delivering the opinion of the court, used the following language, page 255:

"There must be some limit to the service which can be required without additional compensation, under the authority vested in the Postmaster General by the contract, to call for new or additional service of the same character. Otherwise it is within the power of the Government to ruin a contractor by new and wholly unanticipated demands, which caution and prudence, however great, could not have foreseen. If this were a contract between individuals, a claim of the right to require this vast amount of additional work—evidently not within the contemplation of the parties—without additional compensation would hardly be seriously entertained. The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals. The phrase 'new or additional service' is not one of exact meaning, defining the precise extent of the obligation incurred, and permits the court to give it a reasonable construction with a view to doing justice between the parties. In giving a proper construction, the court is required to examine the entire contract, to consider the relation of the parties,

and the circumstances under which it was signed. * * *

"We cannot believe it possible that the parties to this contract contemplated the establishment of a new postal department in the city of New York not then authorized by any act of Congress, which should so greatly increase the service, requiring more than 300,000 miles of additional transfer service and nearly $10,000 of additional expense for ferrying during the time covered in the suit * * *.

"In this case, after the contract was entered into, this enormous new service, clearly not intended by either of the parties to be rendered, was required. In this instance we think the limit of reasonable requirement under the new and additional service clause was exceeded, and the service required cannot be held to be within the terms of the contract. We find no error in the Court of Claims reaching this conclusion."

The last case was followed by the case of

Serralles *vs.* Esbri, 200 U. S., 103; 50 L. Ed., 391-395.

In this case a literal construction of the contract would have required the plaintiff to pay in American dollars a debt contracted in Porto Rican pesos. This court construed the contract in accordance with the intention of the parties at the time it was made, and in rendering its decision commented upon the last case mentioned, holding as follows:

"Even if it were conceded that the (literal) and strict construction of the contract is as decided by the courts below, yet we are clear that such literal and strict construction does not express the real intention of the parties when the contract was made.

"Articles 1281 and 1283 of the Civil Code of Porto Rico, set forth in the foregoing statement, show the law to be in Porto Rico substantially the same as it is here; that is, that where it is plain that a strict and literal construction of the contract does not convey the real meaning of the parties, such construction is

not to be entertained. See cases cited in United States *vs.* Utah, N. & C. Stage Co., 199 U. S., 414, *ante,* 251; 26 Sup. Ct. Rep., 69. In that case the strict and literal construction of the contract was contended, by the officers of the Government, to be its proper construction, and hence, it was argued, when the contractor might, under the provisions of his contract, be required to perform new or additional mail, messenger, or transfer service, under the authority of the Postmaster General, without additional compensation, that then such official could require such additional service as arose by reason of the establishment of what amounted to a new station, which additional service required, above the normal increase of service, an additional distance to be traveled in wagons of over 300,000 miles. This court held that the parties never meant any such thing, and the judgment of the Court of Claims for the recovery of compensation for the extra distance traveled was affirmed."

The rule to be deduced from all of these cases is that a material change in either the character or cost of the thing contracted to be done does not come within the terms of the contract and is a new or different work from that contracted for. Applying this rule to the case now under consideration it seems clear that the delays complained of, and which were caused for the purpose of making a change in the exterior facing of the building from limestone to marble and in the interior of the building from an arrangement suitable for the work of a post-office and courthouse as existing at the time of the signing of the contract to an arrangement that would accommodate the new branch of the service provided for by the parcels-post law, did not constitute delays which were for the purpose or advantage of the work contracted to be done, but did constitute delays which were for the purpose and advantage of a work different from that contracted to be done. A limestone exterior faced building is not a marble exterior faced building. The change in the contract price between a marble building and a limestone

building is sufficient in itself to negative any claim that they can be called the same work. In the present instance the difference in the cost of the two structures was nearly a quarter of a million of dollars, amounting in exact figures to $210,500.00. A change of such magnitude in the materials composing the building changes entirely the work which is to be done under the contract, and any delay arising in anticipation of or caused by such a change would not be for the purpose or advantage of the work contracted to be done, but would be for the purpose or advantage of a different and new work. A post-office system which transports mail matter is not a post-office system which transports both mail matter and merchandise. The post-office at New Orleans, which was contracted to be built under the terms of the contract, was a post-office which should be constructed to handle at New Orleans the business of a post-office system that handles primarily mail matter, and the work was limited in its scope to a building for this purpose. A change in the arrangement of the building for the purpose and advantage of handling the parcels-post business was a change for the benefit and advantage of new work different from that contracted to be done, and a delay in anticipation and for the benefit of such a change would not be a delay for the purpose and advantage of the work, but would be a delay for the purpose and advantage of a different work than that contracted to be done and would not come within the terms of the contract.

It therefore follows that the proviso as to delay when construed in connection with the clause in which its ends does not bar the appellant from recovering damages for the delays suffered by it during the construction of the post-office and courthouse building at New Orleans as alleged in its petition, and that the lower court erred in sustaining the demurrer to its petition.

So far appellant has discussed the construction of the clause of the contract in question and has not argued that

he clause in question and the contract as a whole should be construed in accordance with the intention of the parties at the time it was executed, and that the changes, suspensions, and delays provided for in the contract should be limited to such changes, suspensions, and delays as were within the contemplation of the parties at the time the contract was entered into.

The general rule of construction of all contracts which requires that they shall be construed in accordance with the intention of the parties and their terms limited to matters within the contemplation of the parties at the time of the execution of the contract, has been so generally applied as to require no citation of authorities to support it. The cases heretofore cited all apply the rule as above stated. The rule has been specifically applied in construing clauses releasing from all liability arising from delay in the following cases:

Curnan *vs.* D. & O. R. R. Co., 138 N. Y., 480.

In this case the construction of a clause similar to that in the present case was involved. Plaintiff entered into a contract with the defendant for the construction of a railroad. The contract as entered into contained a clause set up in the language of the court on page 482 in subtsance as follows:

> "By the eighth article of the contract it was provided that the contractor should make no claim for damages from hinderance or delay from any cause, in the progress in any portion of the work or in case the work for any reason should be suspended or delayed, 'and that in no event shall the contractor claim or have a right to extra compensation for damage arising from any suspension or delay in the prosecution of the work' but his time for the performance of the contract was extended in case he was delayed by the acts or omission of the company, 'or on account of failure to secure right of way, or for any other reasons' for a time equal to the hinderance or delay on the prosecution of the work so occasioned."

The defendant delayed the completion of the contract and refused to settle with the contractor, claiming that under the contract for delay the contractor was entitled to an extension of time and that only. The court held on page 489 as follows:

> "The right reserved to the company in the eighth article of the contract to suspend or delay the work, is to be reasonably construed."

The case of

> Waples Co. *vs.* State of New York, 178 App. Div. N. Y., 357,

shows clearly the extent to which a literal construction of a contract may be carried by a party in whose favor it reads.

The contract contained the following provision, page 358:

> "No charges shall be made by the contractor for any delays or hinderances from any cause during the progress of any portion of the work embraced in his contract, but that should a delay be caused by any act of the State authorities, the contractor would be allowed an extension of time for completion of the work sufficient to allow for the delay."

The contractor entered upon the performance of the contract, and upon order from the State authorities ceased work during a certain portion of a certain number of days during the impeachment trial of Sulzer. The plaintiff claimed damages for delay caused by the State authorities and the State denied any liability for such damages, depending upon the clause of the contract above quoted. The court held on page 361 as follows:

> "The second item of damages stands upon a different footing. The contract should be reasonably construed (Curnan *vs.* D. & O. R. R. Co., 138 N. Y., 480). That there would be delay resulting from the holding of the impeachment trial necessitating tem-

> porary suspensions of the work was plainly not within the contemplation of the parties. These delays were caused by the active interference of the State authorities in the prosecution by claimant of its work which so far as appears was being properly conducted and making no more noise than was actually necessary. The contract had not in contemplation that compensation was to be made for such delays by mere extension of time for the performance of the contract. I think the allowance of the second item of the claim was proper."

In the case of

> U. S. *vs.* Mueller, 113 U. S., 153; 28 L. ed., 946,

the contract provided that the defendant in error was to furnish from his quarry "and deliver at the site of the aforesaid building all the dimension stone that may be required in the construction of said building," and to furnish and deliver 100,000 cubic feet of the stone on or before the first of January, 1873, "and the remainder at such times and in such quantities as may be required" by the supervising architect. After the signing of the contract and the delivery of a considerable quantity of the stone the United States twice suspended further deliveries of stone. The reason for the suspension arose from

> "a well founded doubt as to the desirability of completing the Chicago custom house with Buena Vista stone, and on the site. Several commissions made lengthy and exhaustive examinations of the foundation and stone, pending which the United States stopped the work. The damage resulting to the claimant therefrom was $20,000.00."

The Government maintained that under the contract it could require as great or as small an amount of stone as it desired. This court held:

> "The court (of Cl.) was of opinion that as the delay was caused by a contemplated change of purpose in regard to the stone and the site, the enforced suspension and delay were unjustifiable and not covered by the stipulations in the contracts. That the stone and the work should be furnished as 'required.' 19 Ct. of Cl., 591. We are of the opinion that the court was correct in its view. U. S. *vs.* Smith, 94 U. S., 214."

That part of the opinion of the Court of Claims cited with approval by this court appears on pages 591 and 592 as follows:

> "It is said that the defendants had a right under the several contracts to demand these interruptions. The clauses relied upon to sustain the position are taken from the first and third contracts presented in findings I and III, respectively. In the first contract claimant agrees after the first 100,000 feet are delivered, 'to furnish and deliver the remainder at such times and in such quantities as may be required by the defendants or their duly authorized agent.' In his third contract he agrees 'to furnish such number of mechanics and laborers as may be required from time to time' by the defendants and 'to cut such stone in such manner and at such place as may be required by the defendants.' This word 'required' in similar connection occurs very often in Government contracts. This court has had frequent occasion to pass upon its force and meaning. In some cases it has been held to relate to the wants of the service; in others to the unsettled purpose of the Government. In this case we think it should have the former construction. In the erection of so large a building there must necessarily be occasional delays. One part must often await the progress of other parts. Unavoidable accidents will often for short periods of time delay the whole. Such delays would doubtless

be protected by the quoted language of the contracts. In this case the delay was caused by a contemplated change of purpose. It was supposed that a bad site had been selected, and that the sandstone was not sufficiently ornamental or substantial for such a building. While the defendants deliberated the whole work was stopped. If this language would justify a delay of ten months for such a purpose, while the claimant waited with his labor, machinery, and capital, it would also justify a much longer delay, even to the practical abandonment of the work. (Figh's Case, 8 C. Cls. R., 319, United States *vs.*, Smith, 94 U. S., 214.)"

From these cases and the cases heretofore cited it is clear that provisions against delay contained in a contract are to be construed reasonably and in accordance with the intention of the parties at the time of the execution of the contract and to cover only such delays as were contemplated by the parties.

The delays complained of in appellant's petition are delays caused by the United States for the purpose of delaying the work pending action by Congress which might or might not occur and which if such action did take place would cause a material change in the work contracted to be done.

The appellant respectfully submits that under the broadest interpretation that can be placed upon this contract it cannot seriously be maintained that either the appellant or the appellee intended that the work under this contract might be suspended or delayed pending possible action by Congress. Such a provision would be without limit in its application and would so increase bids that might be made for the construction of the work as to make an acceptance of them absolutely impossible if due regard was had to the value of the services to be performed. Appellant respectfully submits that no such delay could have been within the contemplation of the parties, for it is unreasonable to believe

that either of the parties to this contract could have contemplated the suspension thereof pending possible action by Congress. In this respect the following language used by Mr. Justice Day in the Stage Coach case above referred to, is most significant:

> "We cannot believe it possible that the parties to this contract contemplated the establishment of a new postal department in the city of New York *not then authorized by any act of Congress.*"

It is equally impossible to believe that the parties to the contract in issue in this case contemplated that marble exterior facing work not then authorized by any act of Congress would be substituted for the limestone exterior facing work contracted for.

It is equally impossible to believe that the parties to the present contract contemplated the establishment of a new postal department, commonly called the parcels-post system, not then authorized by any act of Congress.

It therefore follows that the delays complained of were not only not within the meaning of the clause of the contract providing against delays but also were not within the contemplation of the parties at the time of the signing of the contract and that therefore the lower court erred in dismissing appellant's petition and that its judgment thereon should be reversed and this cause remanded for further proceedings in accordance therewith.

Respectfully submitted,

ABRAM R. SERVEN,
BURT E. BARLOW,
Attorneys for Appellant,
Wells Brothers Co., of New York.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

WELLS BROTHERS COMPANY OF NEW York, appellant,
v.
THE UNITED STATES.
No. 321.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from the judgment of the Court of Claims dismissing claimant's petition on demurrer thereto, upon the authority of the case of *Merchants' Loan and Trust Company* v. *The United States*, 40 C. Cls. 117. (R. pp. 13–14.) The action was for damages on account of delays in the performance of a contract; the delays having been caused by the United States.

The claim arose out of a contract for the construction of the United States post office and courthouse at New Orleans. The contract was entered into September 30, 1909. The work was to be completed by April 1, 1911, at a total cost of $817,000.

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The specifications called for limestone exterior face stone for the street fronts of said building. (R. p. 3, Par. VII.) On the day after the contract was entered into the contractor was ordered by the Supervising Architect of the building to—

> refrain, until further notice, from ordering the limestone exterior face stone specified by the contract for the construction of the street fronts of said building, for the reason, as stated, that a change was contemplated in said exterior face stonework which would require an additional appropriation by Congress. (R. p. 3, Par. VII.)

Claimant consented to this delay until October 15, and in the meantime proceeded with other work on said building. (R. p. 3, Par. VII.) Claimant was delayed by the Government in purchasing face stone for said building, over his protest, until August 19, 1910, when, the necessary appropriation having been made by Congress, Georgia marble was by agreement substituted for limestone for said exterior facing. (R. p. 3, Par. VIII.)

On February 1, 1912, claimant had substantially completed the building to the point of erecting the partitions specified therein, and was then ready to erect said partitions, when he was ordered by the Supervising Architect to "refrain from the construction of said partitions until further orders in the premises." (R. 4, Par. IX.) This action was taken because the Government desired, if legislation passed, which was then pending, providing for a parcels-post branch of the Postal Service, to so partition the post-

office building as to adapt it to the needs of the Parcel Post Service. This legislation was enacted, and on August 12, 1912, claimant was permitted to go forward with the partitioning. (R. 4, Par. X.)

There is no claim for extra work or materials; the claimant was paid $210,500 for the extra work and materials due to the change in the exterior face stone and $4,602.96 for other extra work, making total payments received from the Government $1,032,102.96, an excess of $215,102.96 over the original contract price of $817,000. (R. 5, Pars. XI, XII.)

The claim is wholly for increased cost on account of the two delays caused by the Government, namely, the delay incident to the change in exterior face stone and the change in the specifications as to partitions. (R. p. 6, Par. XVIII.)

The Court of Claims held by its action in sustaining the demurrer to the petition that the subject of delays caused by the United States, as well as delays due to the contractor, was covered by the contract, and that by the provisions of the contract the contractor was precluded from asserting his claim.

The provisions of the contract relating to the controversy are the following:

> And the said party of the second part further covenants and agrees that the work herein agreed to be performed shall be commenced promptly upon receipt of notice of the approval of the bond hereto attached, and that the same shall be carried on in such order and

at such times and seasons, and with such force as shall from time to time be directed or prescribed by the architects of the building or by the Supervising Architect or his representative, and that the same shall be completed in all parts by April 1, 1911. * * * (R. p. 9.)

It is expressly covenanted and agreed by and between the parties hereto that time is and shall be considered as of essence of the contract on the part of the party of the second part, and in the event that the said party of the second part shall fail in the due performance of the entire work to be performed under this contract, by and at the time herein mentioned or referred to, the said party of the second part shall pay unto the party of the first part, as and for liquidated damages, and not as a penalty, the sum of one hundred fifty dollars for each and every day the said party of the second part shall be in default. * * * (R. p. 9.)

It is further covenanted and agreed by and between the parties hereto that the said party of the second part will make any omissions from, additions to, or changes in, the work or materials herein provided for whenever required by said party of the first part. * * * (R. p. 10.)

It is further covenanted and agreed that no claim for compensation for any extra materials or work is to be made or allowed, unless the same be specifically agreed upon in writing or directed in writing by the party of the first part; and that no addition to, omission from, or changes in the work or materials herein

specifically provided for shall make void or affect the other provisions or covenants of this contract, but the difference in the cost thereby occasioned, as the case may be, shall be added to or deducted from the amount of the contract; and, in the absence of an express agreement or provision to the contrary, no addition to, or omission from, or changes in the work or materials herein specifically provided for shall be construed to extend the time fixed herein for the final completion of the work. * * * (R. pp. 10, 11.)

It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the architects of the building, or of the Supervising Architect, it may be necessary for the purpose or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work; the same to be ascertained by the Supervising Architect; and a similar allowance of extra time will be made for such other delays as the Supervising Architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within ten

days of the occurrence of such delays: *Provided, further,* That no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States. (R. p. 12.)

BRIEF OF ARGUMENT.

The Government contends that the parties having contracted upon the subject of delay, their covenant is binding.

ARGUMENT.

The provisions of the contract quoted in the statement show conclusively that the parties to the contract had in contemplation at the time it was formed the subject of delay in the work due to the contractor, and delay to the contractor caused by the Government. The contractor was to be held liable for delays attributable to him and the measure of his liability was fixed. As to delays caused by the Government it was expressly agreed that the compensation to the contractor therefor should be one additional day over the time limit for completion of the work for each day's delay caused by the Government. This did not relate only to suspensions, which, in the opinion of the architect, "may be necessary for the purpose or advantage of the work," but the contract also provides "and a similar allowance of extra time will be made *for such other delays* as the Supervising Architect may find to have been caused by the United States." If the first delays complained of were not for the "purpose or advantage of the work," in the opinion of the Supervising Architect, it is

hard to imagine what other reason could be assigned for them. It was certainly for the purpose of the work to change the facing stone; and to its advantage to provide the partitions necessary for the postal service; and the right to make changes and alterations was expressly reserved. But even if it could be held, were the foregoing the only provisions of the contract, that these delays were not contemplated by the parties, and should be held excepted from the above plain contractual provisions by an implied exception; still that would not be enough to relieve claimant from under this contract, for the contingency that some delay attributable to the Government might take place, not coming under these provisions, is covered by the provision immediately following relating to "such *other* delays as the Supervising Architect may find to have been *caused by the United States.*" This was not all—to cover the matter completely, the final agreement was—

> *Provided further*, That no claim shall be made or allowed to the contractor for *any* damages which may arise out of *any* delay caused *by the United States.* (R. p. 12.)

There is no need for resorting to rules of construction to ascertain the intent of the parties; they have expressed it in certain language; and this calls for the application of the primary and fundamental rule of construction, that where the terms of a written instrument are clear and unambiguous, resort may not be had either to other rules of construction or to extrinsic evidence to misconstrue what is stated.

The claimant agreed that he would not make and could not be allowed any claim for any damages for any delay caused by the United States. This intent is twice expressed in the provision of the contract on the subject of delay attributable to the United States.

> In that instrument the defendant in error made a covenant. That covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. (*Dermott* v. *Jones*, 2 Wall., 1, 7.)

The case cited by the Court of Claims, *Merchants' Loan and Trust Co.* v. *United States* (40 Ct. Cls., 117), is strictly in point; as is also the case of *Chouteau* v. *United States* (95 U. S., 61, 67, 68), in which a contractor was denied recovery on account of delays expressly found to have been caused by the Government. The following language from the last cited case is peculiarly applicable:

> It is very clear that both parties contemplated the probability that the work would not be completed at the precise period of eight months from the date of the contract. They also contemplated that changes would be made in the construction of the battery. They made such provision for these matters as they deemed necessary for the protection of each party (p.68).

The parties to this contract had in contemplation the contingency of delay attributable to the con-

tractor and delay caused by the Government, they provided explicitly for both, and by the terms of this provision the claim which the contractor has attempted to assert is denied.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

FRANK DAVIS, JR.,
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JNO. W. TRAINER,
Attorney.

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WELLS BROTHERS COMPANY OF NEW YORK *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 75. Submitted April 30, 1920.—Decided November 8, 1920.

Where a contract for the construction of a public building, giving the United States a broad power to suspend operations where necessary in the opinion of its architects for the purpose or advantage of the work, permitted the United States to make changes of materials, and, besides providing against claims for damages on account of such changes, declared generally that no claim should be made or allowed to the contractor for any damages arising out of any delay caused by the United States, *held*, that a delay ordered to await an appropriation by Congress for substituted materials and another in anticipation of the passage of a postal law because of which the plans were altered, would not support claims for damages under the contract. P. 85.

54 Ct. Clms. 206, affirmed.

THE case is stated in the opinion.

Mr. Abram R. Serven and *Mr. Burt E. Barlow* for appellant.

Mr. Assistant Attorney General Davis for the United States. *Mr. Jno. W. Trainer* was also on the brief.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims, sustaining a general demurrer to and dismissing the amended petition.

The allegations of this amended petition, admitted by the demurrer and essential to be considered, are:

The appellant, a corporation organized under the laws of New York, and engaged in the general building and construction business, entered into a written contract with the United States for the construction of a post office and court house building in New Orleans, dated September 30, 1909, for which it was to be paid $817,000, but its bond for performance was not approved until nine days later, on October 9; on the day after the contract was signed the United States "ordered and directed" appellant to delay ordering limestone (as specified in the contract) for the exterior of the street fronts of the building "for the reason, as stated, that a change was contemplated in said exterior face stonework which would require an additional appropriation by Congress"; the appellant assented to a delay of two weeks only, but, although protesting that further delay would result in its damage, it refrained from purchasing limestone until August 19, 1910, when, the required appropriation by Congress having been obtained, a supplemental agreement was entered into by the parties to the contract by which marble was substituted for limestone for the street fronts of the building, the compensation of the appellant was increased $210,500, and the time for completion of the building was extended from April 1, 1911, to February 5, 1912; during this delay the contractor proceeded with other work under the contract and prior to August 19, 1910, it had completed all the required excavation, foundation and structural steel work; after the "modification and addition of August 19, 1910, to the contract work" the appellant so proceeded with the performance of the contract that by February 1st, 1912, the building was substantially completed except the interior partitions, and thereupon the United States, again over the protest of appellant, "ordered and directed" a delay, which continued to Au-

gust 24, 1912, until congressional legislation was obtained authorizing the Parcel Post, whereupon the plans for the interior arrangements of the building were adapted to that service and the building was completed.

The claim is wholly for damages occasioned by the two delays thus described, and the question for decision is, whether the terms of the contract authorized the Government to require such delays without becoming liable to the contractor for damages which may have been caused to it thereby.

The contract involved contains this provision:

"It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the architects of the building, or of the Supervising Architect, it may be necessary for the purpose or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise, and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work; the same to be ascertained by the Supervising Architect; and a similar allowance of extra time will be made for such other delays as the Supervising Architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within ten days of the occurrence of such delays; provided, further, that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States."

The contract further declares that the contractor:

"Will make any omissions from, additions to, or changes in, the work or materials herein provided for whenever

required by said party of the first part; . . . and that no claim for damages, on account of such changes or for anticipated profits, shall be made or allowed."

It would be difficult to select language giving larger discretion to the United States to suspend the performance of the "whole or any part of the work" contracted for, or to change the work or materials, than that here used. The provision for the protection of the work shows that long interruptions were contemplated with a compensating extension of time for performance provided for, and it is admitted that, eight days before its bond was approved and it became bound, the appellant received its first order to delay, for the reason that "a change was contemplated in said exterior face stonework which would require an additional appropriation by Congress."

Such a delay as was thus ordered was certain to be an infidenite and very probably a long-continued one, but the appellant, experienced contractor that it was, did not hesitate to submit to it by permitting the approval of its bond, which rendered its obligation under the contract complete, more than a week after notice had been received of the order. Thus, with much the longest delay complained of ordered and actually entered upon, the appellant consented to be bound by the language quoted, which vested such comprehensive discretion over the work in the Government. That this confidence of the contractor was not misplaced is shown by the fact that this first delay resulted in the substitution of marble for limestone for the street fronts of the building and in a supplemental agreement by which it received additional payments, aggregating $210,500, and an extension of ten months for the completion of the work.

In addition to all this it must be noted that the first paragraph, above quoted, concludes with this independent proviso:

"Provided, further, that *no claim shall be made or allowed*

to the contractor for any damages which may arise out of any delay caused by the United States."

Here is a plain and unrestricted covenant on the part of the contractor, comprehensive as words can make it, that it will not make any claim against the Government "for *any damages* which may arise out of *any delay* caused by the United States" in the performance of the contract, and this is emphasized by being immediately coupled with a declaration by the Government that if such a claim should be made it would not be allowed.

Such language, disassociated as it is from provisions relating to "omissions from," the making of "additions to, or changes in," the work to be done, or "materials" to be used, can not be treated as meaningless and futile and read out of the contract. Given its plain meaning it is fatal to the appellant's claim.

Men who take million-dollar contracts for Government buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in other parties to such contracts than the contractors, and the presumption is obvious and strong that the men signing such a contract as we have here protected themselves against such delays as are complained of by the higher price exacted for the work.

We are dealing with a written contract, plain and comprehensive in its terms, and the case is clearly ruled in principle by *Day* v. *United States*, 245 U. S. 159, 161; *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 164, 165; *Dermott* v. *Jones*, 2 Wall. 1, 7, and *Chouteau* v. *United States*, 95 U. S. 61, 67, 68. The judgment of the Court of Claims dismissing the petition must be

Affirmed.